

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES GERRON, JR.,

Defendant-Appellant.

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UNPUBLISHED

December 19, 2013

No. 312564

Kent Circuit Court

LC No. 11-006721-FC

Before: WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery and conspiracy to commit armed robbery, MCL 750.529; MCL 750.157a; first-degree home invasion, MCL 750.110a(2); assault with intent to do great bodily harm less than murder, MCL 750.84; and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 15 to 40 years' imprisonment for armed robbery, 10 to 30 years' imprisonment for conspiracy to commit armed robbery, 7 to 20 years' imprisonment for first-degree home invasion, 6 to 10 years' imprisonment for assault with intent to do great bodily harm less than murder, and two years' imprisonment for felony-firearm. Defendant appeals as of right. Because we conclude that one of the trial court's articulated reasons for departure from defendant's sentencing guidelines range was not substantial and compelling, we vacate defendant's sentence and remand for resentencing.

On appeal, defendant challenges only the trial court's decision to depart from the recommended sentencing guidelines range for his armed robbery conviction. Defendant's minimum sentencing guidelines range for his armed robbery conviction was 81 to 135 months; however, the trial court imposed a minimum sentence of 15 years, which is 180 months.

"A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). Reasons for departure are substantial and compelling where they are "objective and verifiable" and "of considerable worth in determining the length of the sentence and . . . keenly or irresistibly grab the court's attention." *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). A reason is "objective and verifiable" where "the facts to be considered by the court [are] actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision,

and [are] capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

In reviewing a departure from the sentencing guidelines range, whether a factor that may justify an upward departure exists is a factual determination reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Whether a factor is objective and verifiable is reviewed de novo, while whether a factor is a substantial and compelling reason to depart from the sentencing guidelines is reviewed for an abuse of discretion. *Id.* at 264-265.

In this case, the trial court’s first reason for departure was the “egregious assault” the victim suffered during the robbery. Testimony during the trial established that Shawn Murphy and defendant broke into the victim’s apartment. Murphy pushed the victim onto a couch, held his neck, continuously pistol whipped him, and repeatedly asked where his money was located. After briefly searching the apartment, Murphy resumed hitting the victim and demanding money. Murphy aimed a gun at the victim and actually forced the gun into the victim’s mouth. After the victim feigned unconsciousness by collapsing on the floor, Murphy kicked the victim twice in the face. While Murphy engaged in the actions above, defendant held a shotgun on the victim. After Murphy and defendant left the victim’s apartment, his face was covered in blood. The victim was subsequently treated for lacerations to his scalp and abrasions on his face.

The fact that the victim suffered an “egregious assault” was external to the trial court’s mind and was confirmed at trial. Accordingly, this reason for departure was objective and verifiable. *Abramski*, 257 Mich App at 74. Moreover, Offense Variable (OV) 7, MCL 777.37 (aggravated physical abuse) allows the trial court to assign a score of 50 points where “[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). Murphy’s conduct was plainly the type of conduct meant to be scored under OV 7.

In this case, the trial court concluded that it could not score OV 7 when calculating defendant’s sentencing guidelines because in *People v Hunt*, 290 Mich App 317, 325-326; 810 NW2d 588 (2010), this Court held that only a defendant’s actual participation in sadistic, torturous, excessively brutal, or fear-inducing acts justifies scoring OV 7 at 50 points. Thus, the egregious nature of the attack on the victim was not weighed by OV 7 in this case, even though defendant’s conduct of pointing a shotgun at the victim while Murphy assaulted the victim fully supported and enabled Murphy. A trial court may depart from the sentencing guidelines when they do not accurately weigh the characteristics of the offense. *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007); MCL 769.34(3)(b). The egregious assault is “objective and verifiable,” “of considerable worth in determining the length of the sentence,” and keenly grabs this Court’s attention. *Smith*, 482 Mich at 299. Thus, we conclude that the egregious assault endured by the victim during the armed robbery was a substantial and compelling reason for the trial court’s departure from defendant’s sentencing guidelines range.

The trial court also stated that it was departing from the guidelines range because it declined to exercise its discretion to make defendant’s first-degree home invasion sentence run consecutively to his other sentences under MCL 750.110a(8). Under MCL 750.110a(8), a trial court may order a term of imprisonment imposed for first-degree home invasion to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from

the same transaction. We conclude that defendant's eligibility to be sentenced consecutively under MCL 750.110a(8) was not a substantial and compelling reason for the trial court's departure. A defendant's sentencing guidelines range is determined by scoring offense variables and prior record variables, and these variables relate to the characteristics of the offense and the particular offender. Departure from the sentencing guidelines is permitted when the scored variables fail to properly consider and account for additional characteristics of the offender or the offense. The trial court's decision not to exercise its discretion to impose consecutive sentences under MCL 750.110a(8) is unrelated to any characteristic of defendant or the offense in this case, and thus, it cannot constitute a substantial and compelling reason for departure from defendant's sentencing guidelines range.

Because we cannot determine whether the trial court would have departed from defendant's sentencing guidelines range or departed to the same degree on the basis of the sole substantial and compelling reason for departure, we must vacate defendant's sentence and remand this case for resentencing absent consideration of the trial court's decision not to impose consecutive sentences under MCL 750.110a(8). *Babcock*, 469 Mich at 271. We note that at resentencing, the trial court may also reconsider whether to exercise its discretion to impose consecutive sentences under MCL 750.110a(8).

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck  
/s/ Joel P. Hoekstra  
/s/ Elizabeth L. Gleicher